IN THE
MISSOURI SUPREME COURT

GARY BLACK,	)	
Appellant,	)	
vs.	)	No. SC 85535
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE JON DERMOTT, JUDGE

APPELLANT'S REPLY BRIEF

Melinda K. Pendergraph, MOBar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

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JURISDICTIONAL STATEMENT

The original Jurisdictional Statement is incorporated by reference.

STATEMENT OF FACTS

Appellant's Statement of Facts is incorporated by reference.

POINTS RELIED ON

I. Blood Spatter Expert

The State's assertion that Gietzen's testimony was consistent with the State's theory that Johnson was stabbed while seated inside the truck is unsupported by the record. Gietzen's testimony, grounded in the uncontroverted physical evidence, reveals that Johnson must have been stabbed outside the truck. Counsel's failure to investigate and produce this evidence was unreasonable, because counsel failed to consult with an expert who was familiar with blood spatter and Mr. Black was prejudiced since this evidence would have established a street fight, not a deliberate murder.

Wolfe v. State, 96 S.W.3d 90 (Mo.banc 2003);

Moore v. State, 827 S.W.2d 213 (Mo.banc 1992); and

State v. Michael Taylor, S.Ct. No. 85235.

II. Witnesses' Prior Inconsistent Statements Show the Fight Occurred in the Middle of the Street

The State's argument that Black failed to prove his claim is refuted by the record. Black established that Andy Martin, Mark Wolfe, Jamie Brandon, and Michelle Copeland made prior inconsistent statements, counsel knew about them, and had no reasonable strategic reason for failing to impeach the witnesses or eliciting their statements for substantive evidence in Black's defense.

Clay v. State, 954 S.W.2d 344 (Mo.App.E.D.1997);

Crawford v. Washington, 124 S.Ct. 1354 (2004);

State v. Hutchison, 957 S.W.2d 757 (Mo.banc 1997); and

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III. Lesser Included Offense Instructions Supported by the Evidence

The State's argument that counsel can never be found ineffective for not submitting lesser-included offense instructions if the jury might have acquitted of the greater offense is contrary to the law.

Beck v. Alabama, 447 U.S. 625 (1980);

Keeble v. United States, 412 U.S. 205 (1973);

Patterson v. State, 110 S.W.3d 896 (Mo.App.W.D.2003);

State v. Dexter, 954 S.W.2d 332 (Mo.banc 1997).

IV. Lawson's Prior Statements Show a Fight that Spun Out of Control, Not a Deliberate Murder Deserving a Death Sentence

Contrary to the State's argument, Black adequately proved that Lawson made prior inconsistent statements and could have been impeached with them. The record also shows that counsel had no reasonable strategy for not impeaching Lawson with them and not offering them as substantive evidence supporting Black's lack of deliberation.

Clay v. State, 954 S.W.2d 344 (Mo.App.E.D.1997);

VI. Counsel's Failure to Challenge the DOC Records

DOC records contained hearsay upon which the state relied to obtain a death sentence. The State's argument to the contrary is unsupported by the record. Counsel's failures to object properly were unreasonable, given her strategy of attempting to exclude the records.

Crawford v. Washington, 124 S.Ct. 1354 (2004);

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996);

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VIII. Movant's Right to Reject Appointed Counsel Under Rule 29.16

Rule 29.16(a) and this Court's decisions demonstrate that Rule 29.15 litigants are entitled to conflict-free counsel.

Moore v. State, 934 S.W.2d 289, 292 (Mo.banc 1996);

State ex rel. Public Defender Commission v. Bonacker, 706 S.W.2d 449 (Mo.banc 1986); and

Rule 29.16.

ARGUMENT

I. Blood Spatter Expert

The State's assertion that Gietzen's testimony was consistent with the State's theory that Johnson was stabbed while seated inside the truck is unsupported by the record. Gietzen's testimony, grounded in the uncontroverted physical evidence, reveals that Johnson must have been stabbed outside the truck. Counsel's failure to investigate and produce this evidence was unreasonable, because counsel failed to consult with an expert who was familiar with blood spatter and Mr. Black was prejudiced since this evidence would have established a street fight, not a deliberate murder.

The crime scene pictures show that Mr. Johnson was stabbed while he was outside the pickup truck, not while he was in its passenger seat. Gietzen, a blood spatter expert, unequivocally so stated and the record refutes the State's suggestions to the contrary (Resp.Br. at 17, 22-23). The State asserts: "Gietzen would have testified that he did not know whether an arterial spurt occurred in the truck and he could not say whether the victim was stabbed while he was within the truck." (Resp.Br. at 17).

Gietzen reviewed Exhibit 10, a "photographic view taken with an open passenger door into the right-side passenger cab compartment." (Gietzen Depo at 27). When asked about its significance, Gietzen said:

> I used Deposition Exhibit 10 as a view of the passenger seat to assess the witness statement of the defendant looking - - being

turned or in a position facing the passenger door at the time the wound was inflicted.

Again, realizing that the injury to the neck was on the left side, I looked at this photograph in an attempt to see if there would be any arterial spurt on the area of the dash or the door area, which would be a likely deposition spot if the wound was inflicted and arterial spurt was occurring with the victim facing out the passenger door.

Q. Why would the dash be a normal deposition spot of the blood?

A. Again, the victim would be facing out the door, and therefore the left side of the neck would be potentially in the area where the blood - - the arterial spurt would go onto the top of the dash, the front of the dash, just positional-wise.

I also noted that during the course of the examination of Deposition Exhibit 10 and 9 that I also in addition to that looked at the arc that would be formed with the victim facing out the front windshield. That would be from that ninety-degree arc from facing out the windshield to facing in the - - in the direction or out the passenger door.

And *I observed no arterial spurt in that ninety-degree arc,* which would go from - - go to the right, from the left to right.

Id. at 27-28 (emphasis added). Gietzen then described the arterial spurt on the outside passenger side of the truck:

> I've noted, and specifically referring to Deposition Exhibit 11, behind the passenger door on the right-side bed, front section of the bed of the pickup, I noted a very heavy deposition of bloodstain pattern. Included in that deposition and bloodstain pattern was the movement of the blood downward due to gravity. *That, in my opinion, is consistent with arterial spurt*.

Id. at 29-30. Gietzen concluded:

> [I]t is my opinion that he was outside - - outside the truck at that time with a neck injury, and he was facing forward to the front of the truck.

Id. at 33.

Exhibit 12, a photograph of the passenger seat demonstrates that Johnson was not stabbed while inside the truck. *Id*. at 37-38. Gietzen noted:

> What it does ***not*** show is any bloodstain patterns, in my opinion, that are consistent with arterial spurt on the passenger seat.

Id. at 38 (emphasis added). He observed no bloodstain pattern consistent with arterial spurt. *Id*. at 40. However, Gietzen did see arterial spurt outside the truck. *Id*. at 42. Gietzen finally concluded:

> Based on my review of the material submitted in the case, again with the emphasis on the photographs and the medical reports, I rendered

the opinion that *I found no indication of arterial spurt inside the pickup or the cab area. Therefore, the lack of arterial spurt inside the pickup truck, the cab of the pickup truck, indicates to me that the wound was not inflicted while the victim was inside the pickup.*

Q. The victim - -

A. Or was in a - - the victim was in a normal, seated position inside the pickup looking outside the front window. It also does not appear to be consistent with the victim having been turned - - being - - having the injury inflicted while the victim was inside the pickup truck turned to the right facing out the passenger window.

Q. Is that - -

A. And finally, *there is no evidence or no indication to me, in my opinion, that there is arterial spurt inside the vehicle. That indicates to me that the stab wound did not occur - -or the injury did not occur inside the pickup truck.*

Q. Is your opinion based on a reasonable degree of scientific certainty?

A. Yes.

Id. at 52-53 (emphasis added).

Contrary to the State's suggestion (Resp.Br. at 22), Gietzen never waivered. He could not opine whether the blood on the road contained arterial spurt, because the photographs were too dark. *Id*. at 57-58. He found arterial spurt only on the

outside of the pickup. *Id*. at 58. He explained that the witnesses' assertions that Johnson was inside the truck when stabbed were contrary to the physical evidence:

> A. He was out of the truck after he was stabbed, by the presence of the arterial spurt on the side of the cab. It - - *again, the lack of arterial spurt found inside the cab suggests to me that he was not stabbed while he was inside or had his head or neck area inside the pickup truck.*
>
> Q. Still possible that happened, though, isn't it?
>
> A. I couldn't opine on that, mainly because that would depend on what possibility you're talking about.

Id. at 59 (emphasis added). When asked again about whether the blood spatter evidence was consistent with Johnson being in the truck when stabbed, Gietzen responded:

> A. Again, . . . *I don't see any photographic evidence of arterial spurt that would suggest to me that the victim was inside the truck at the time of the wound.*

Id. at 62. Gietzen repeated that he saw evidence of arterial spurt outside the truck. *Id*. at 64-65.

Gietzen's testimony demonstrates that the blood evidence was consistent with Johnson being stabbed while he was outside, not inside, the truck. Accordingly, it would have helped to show that the fight occurred in the middle of the street and that Black did not sneak up on Johnson and stab him inside the

truck, a scenario the State argued showed deliberation (T.Tr. 562-64, 1061, 1069, 1070, 1100-02).

Gietzen noted that the lower right-hand side of the seat, by the seat adjustment, had some characteristics of arterial spurt. *Id*. at 45, 64. Even if the seat adjustment bore the arterial spurt, the State fails to explain how it could have been deposited there while Johnson was seated inside the truck. Johnson was stabbed on the left side of his neck, not the right. The blood was on the right. The truck seats did not spin. The blood had to have been deposited when Johnson returned to the truck after the fight in the street.

Gietzen's testimony on blood spatter would have helped the defense, which counsel admitted:

> A. It would be better if he [Mr. Johnson] was stabbed outside that truck, yes.
>
> Q. Okay. Why would it be better?
>
> A. Because it would assist in the initial aggressor and the retreating of Gary, it would assist in that argument.

(H.Tr. 39-40). Counsel admitted that she would have wanted to hire a blood spatter expert if he had something helpful to say, but she did not pursue that (H.Tr. 41). Counsel talked to the medical doctor, Dr. Mauldin,[1] who was hired to

[1] The State deposed Dr. Charles C. Mauldin, Jr., M.D. on November 30, 1999, a week before trial. Counsel retained him to review Johnson's medical records and

determine medical issues regarding the care Johnson received from the hospital (H.Tr. 40-41, 72). Counsel said Mauldin did not think a blood spatter expert would be helpful. *Id*. Counsel was unsure what information Mauldin had (H.Tr. 41). Mauldin was not a blood spatter expert (H.Tr. 40, 72). As such, he was not qualified to asses whether a blood spatter expert would have been helpful.

Counsel's lack of investigation into the physical evidence was ineffective. *Wolfe v. State*, 96 S.W.3d 90, 93-95 (Mo.banc 2003); *Moore v. State*, 827 S.W.2d 213, 215-16 (Mo.banc 1992) (failure to adequately investigate and test physical evidence ineffective). The State neither addresses these cases, nor attempts to distinguish them. Why? Because they support the ineffective assistance of counsel claim.

Given the importance of this blood evidence, counsel unreasonably failed adequately to investigate and present it to the jury. A new trial should result.

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provide opinions regarding his cause of death. Mauldin's deposition reveals what information he had, Johnson's medical records, and Mauldin's opinions, which all related to Johnson's cause of death and his hospital treatment. Mauldin testified under oath regarding the opinions he gave counsel, and they included nothing about blood spatter. This deposition was not filed, but counsel will provide it to the Court, should it request it. *See*, *State v. Michael Taylor*, S.Ct. No. 85235, oral argument held April 7, 2004, in which Judge Limbaugh requested a witness' deposition be filed, even though it was not part of the record on appeal.

II. Witnesses' Prior Inconsistent Statements Show the Fight Occurred in the Middle of the Street

The State's argument that Black failed to prove his claim is refuted by the record. Black established that Andy Martin, Mark Wolfe, Jamie Brandon, and Michelle Copeland made prior inconsistent statements, counsel knew about them, and had no reasonable strategic reason for failing to impeach the witnesses or eliciting their statements for substantive evidence in Black's defense.

The jury never heard that all six eyewitnesses who testified at trial originally stated that the fight occurred outside the pickup. Counsel impeached only Andy Martin with his initial statements. She never impeached state witnesses, Wolfe and Brandon. She never elicited this favorable information from her witness, Copeland.

The State attempts to avoid the merits, arguing that Black did not adequately prove this claim (Resp.Br. at 27, 28, 29, 29-30), citing *State v. Hutchison*, 957 S.W.2d 757, 760-61 (Mo.banc 1997) and *State v. George*, 921 S.W.2d 638, 648 (Mo.App.S.D.1996). Black confronted his trial attorney with these witnesses' prior statements and she acknowledged having had their statements, and yet not impeaching them (H.Tr. 18, 19-20, 20, 22-23, 24, 25, 27, 28, 35-36). Counsel also testified about whether she had any strategy in failing to impeach witnesses (H.Tr. 19, 20, 21-22, 23, 25, 26, 28-29, 37). The State

suggests, however, that Black should have called each testifying witness, to show that they would have admitted making the statement, and the person to whom they made the statement (Resp. Br. at 27, 28, 29).

The State's argument is squarely refuted by *Clay v. State*, 954 S.W.2d 344, 347-48 (Mo.App.E.D.1997) (Blackmar, S.J.). There, counsel was held ineffective for not investigating an eyewitness' prior inconsistent statements to police regarding his level of certainty that defendant was the murderer, not impeaching the witness, and not offering his statements as substantive evidence. *Id*. at 347-50. The motion court had denied the claim because the eyewitness was not called as a witness at the evidentiary hearing. *Id*. at 347. The Court of Appeals, however, ruled that the statements could be established by other testimony. *Id*. It also found that "[t]he 29.15 hearing is not a trial of the charges. Its purpose is to receive evidence touching on the adequacy of counsel's performance. The officer's testimony shows that important evidence was available if only counsel had looked for it." *Id*. at 348.

Like *Clay*, counsel failed to impeach witnesses with prior inconsistent statements and never offered them as substantive evidence to support the defense that Black did not deliberate. All prior statements were read into the record and counsel agreed that each witness had made the statements and explained whether she had reasons for not impeaching each witness (H.Tr.18, 19-20, 20, 22-23, 24, 25, 27, 28, 35-36). Officer Randal J. Beebe testified by deposition (Beebe Depo) and the prosecutor agreed to using his deposition as substantive evidence for the

post-conviction proceedings. *Id*. at 4-5. The police report of Andy Martin's statement (Exhibit 17) was introduced as an exhibit through the officer. *Id*. at 11, 17. Depositions of Andy Martin, Mark Wolfe, Jamie Brandon, and Officer J.D. Beil were offered and admitted into evidence as Exhibits 28-31 (H.Tr. 67, Supp.L.F. 31-246).

The record shows that Andy Martin, Mark Wolfe, Jamie Brandon, and Michelle Copeland made prior inconsistent statements. Counsel should have used them for impeachment and as substantive evidence that Black never stabbed Johnson while he was sitting in the truck, but the fight occurred in the street. Further, since Johnson actually hit Black with a beer bottle, this evidence would have supported counsel's defense. Finally, it would have been supportive since the state's witnesses minimized how long they drank alcohol, calling into question their truthfulness, ability to recall and to perceive the events.

The State's citations to *Hutchison* and *George* are unavailing. In *Hutchison*, the issue was whether portions of a non-testifying co-defendant's statement to police could be introduced under the admission against penal interest exception to the hearsay rule. *Hutchison*, 957 S.W.2d at 760. This Court found the statement was hearsay and did not meet the requirements of *Chambers v. Mississippi*, 410 U.S. 284 (1973), in that it did not exonerate the defendant and was not made under circumstances making it reliable.

In contrast, here, Black did not suggest the statements be offered as admissions. Rather, they should have been elicited as prior inconsistent

statements. "The theory of attack by prior inconsistent statement is that talking one way on the stand and another way previously is blowing hot and cold and raises a doubt as to the truthfulness of the present testimony." John O'Brien, *Missouri Law of Evidence*, Section 5-5 (3d ed. 1996), citing *State v. Vaughn*, 501 S.W.2d 839, 842 (Mo.banc 1973); and *Reno v. Wakeman*, 869 S.W.2d 219 (Mo.App.S.D.1993). If the statement is offered for impeachment, it is not hearsay. O'Brien, *supra*.

In Missouri, prior inconsistent statements are also admissible as substantive evidence. Section 491.074, RSMo 2000. Section 491.074 does not violate the Sixth Amendment right to confrontation, since the witness is available to testify and is subject to cross-examination. *Crawford v. Washington*, 124 S.Ct. 1354, 1369 (2004). "When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id*., citing *California v. Green*, 399 U.S. 149, 162 (1970).

Like *Hutchison*, *George* does not assist the State. There, the claim was that counsel should have impeached a child victim's testimony with the deposition of another child victim. *State v. George*, 921 S.W2d at 648. The Court found that Rule 25.13 governed the admission of depositions and using another's deposition to impeach a different witness was impermissible. *Id*.

Black never claimed counsel was ineffective for not using other witnesses' depositions to impeach witnesses. Rather, he claimed that counsel was ineffective for not impeaching testifying witnesses with their prior inconsistent statements.

Those statements were known to counsel from police reports, investigator reports, depositions, and police officers who took their statements.

As in *Clay*, had counsel impeached these witnesses, a reasonable probability exists that the jury would have found that Black did not deliberate, but reacted with anger and passion. A new trial should result.

III. Lesser Included Offense Instructions Supported by the Evidence

The State's argument that counsel can never be found ineffective for not submitting lesser-included offense instructions if the jury might have acquitted of the greater offense is contrary to the law.

The State suggests that counsel can never be found ineffective for not submitting a lesser-included offense instruction where the jury might have acquitted of the greater offense (Resp. Br. at 35-36). Under the State's reasoning, since the jury could have acquitted, an all-or-nothing defense is always reasonable. *Id*. This argument has been rejected by appellate courts and should be rejected here as well.

The Supreme Court has addressed the State's theoretical argument that, since a jury might acquit, no prejudice results from not submitting a lesser:

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction--in this context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.

> Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Beck v. Alabama, 447 U.S. 625, 634 (1980), quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973).

In *Patterson v. State*, 110 S.W.3d 896, 906-907 (Mo.App.W.D.2003), counsel was held ineffective for not presenting a properly-worded instruction for the lesser-included offense of stealing. Since the evidence would have let the jury acquit Patterson of second-degree robbery and convict him of stealing, counsel unreasonably failed to submit the proper instructions. *Id*. at 907. Since the evidence of physical force was not overwhelming, Patterson was prejudiced. *Id*. A reasonable probability exists that a juror might have determined that there was no threat in the stealing. *Id*. Simply because the jury could have acquitted, the Court did not conclude counsel was effective.

So, too, counsel failed to submit lesser-included offense instructions in a case where the jury could have found that the defendant did not deliberate before killing his wife. *State v. Dexter*, 954 S.W.2d 332, 335 (Mo.banc 1997). This Court presumed that counsel's decision not to offer lesser-included offense instructions was reasonable trial strategy, since counsel was not asked at the post-conviction hearing about why he failed to proffer the instructions. *Id*. at 344. However, this Court left open the possibility that counsel could be found ineffective, if counsel had no reasonable trial strategy. *Id*.

Here, a basis for acquitting Black of first degree murder existed since the evidence of deliberation was weak. Johnson was drunk, with a blood alcohol content of .29 (T.Tr. 917). He was rowdy that evening and was mouthy to women at a bar (T.Tr. 818). While he was at a convenience store purchasing more beer (T.Tr. 587, 593), he angered Tammy Lawson, Black's girlfriend (T.Tr. 590-94). Lawson pointed Johnson out to Black. *Id*. Black and Lawson followed Martin's pickup and Johnson and Black yelled at each other (T.Tr. 684-85, 687, 717). They fought; Johnson hit Black with a 40-ounce beer bottle, and Black stabbed Johnson once in the neck (T.Tr. 611, 643, 891). As Black tried to leave, Johnson hung onto Black's car and tried to hit Black (T.Tr. 724, 734-35).

A rational fact-finder could have found that Black acted without deliberation. *See*, *State v. Black*, 50 S.W.2d 778 (Mo.banc 2001) (Wolff, J., dissenting). The evidence supported Black's intent to cause serious physical injury by stabbing Johnson in the neck, but it did not establish deliberation, cool reflection. Rather, the evidence showed that Black was angry, out-of-control, and never coolly reflected on killing Johnson. The jury asked what deliberation meant, asking the trial court to further define "cool reflection." (D.L.F.563). Since there was no deliberation, but arguably an intentional killing, the evidence supported second-degree murder.

The jury could have also found that Black acted under sudden passion arising from adequate cause. Lawson came out of the convenience store and pointed out Johnson. Black became angry and chased Johnson down the street,

where they yelled at each other. Reasonable jurors could have inferred that Black's passions suddenly arose because a drunken Johnson sexually harassed Black's girlfriend.

The State suggests that *Beck* does not apply because Black could have been convicted of first degree murder and sentenced to life without parole, thus the jury had a "third option," not just death or acquittal (Resp.Br. at 38). *Beck* rejected this very argument. 447 U.S. at 629-30. There, life without parole was an option for robbery-murder. *Id*. at 629. The trial judge was required to consider aggravators and mitigators and consider that option. *Id*. The Court was unpersuaded that having such an option adequately compensated for the risk that the jury may return an improper verdict because a third option is unavailable. *Id*. at 645.

This Court also has rejected the suggestion that Missouri has two types of first degree murder: 1) aggravated murder in which death is appropriate, and 2) a lesser offense of first degree murder, in which life without parole is appropriate. See, *State v. Cole*, 71 S.W.3d 163, 171 (Mo.banc 2002); and *Christeson v. State*, S.Ct. No. 85329, slip op. at 8 (Mo.banc April 13, 2004). In *Cole*, this Court ruled :

> Appellant's argument is based upon the premise that while section 565.020 establishes a single offense of first-degree murder, the combined effect of sections 565.020 and 565.030.4 is to create two types of first- degree murder. According to Appellant, the before-mentioned statutes delineate two separate crimes, "unenhanced"

> first-degree murder, carrying a maximum sentence of life without probation or parole, and "aggravated" first-degree murder, requiring an additional element of at least one statutory aggravator pursuant to Section 565.032 and which carries the maximum sentence of death. Appellant claims the failure to include any statutory aggravators in either the indictment or the information necessarily results in Appellant only being charged with "unenhanced" first-degree murder and to assess a sentence of death increases the statutory maximum penalty which was beyond the jurisdiction of the trial judge.
>
> Appellant's claim is meritless. Section 565.020 ***defines a single offense of first-degree murder with the express range of punishment including life imprisonment or death.*** Section 565.030 delineating trial procedure in cases of first-degree murder does not create, or differentiate, two separate categories of first-degree murder offenses.

Cole, supra at 171.

State courts must decide lesser-included offenses under state law. *Hopkins v. Reeves*, 524 U.S. 88, 91 (1998). This Court has found that second-degree murder is a lesser included offense of first-degree murder. *State v. Santillan*, 948 S.W.2d 574 (Mo.banc 1997); Section 565.025.2. This Court has rejected that there are two types of first degree murder, aggravated and the lesser, allowing life

without parole. *Cole* and *Christeson*, *supra*. Thus, the State's argument that the jury had a third option under *Beck's* due process requirement must fail.

Counsel admitted that her failure to submit lesser instructions was unreasonable, and that it was the one thing she would change about the case (H.Tr. 68). Prejudice resulted as Black was left with no meaningful defense. As this Court found, "it is undisputed that the defendant stabbed the victim after tailing him for blocks. The defendant presented no credible evidence of self-defense." *State v. Black*, 50 S.W.2d 778, 793 (Mo.banc 2001). By not submitting the lessers, counsel left her client with no credible defense. A new trial should result.

IV. Lawson's Prior Statements Show a Fight that Spun Out of Control, Not a Deliberate Murder Deserving a Death Sentence

Contrary to the State's argument, Black adequately proved that Lawson made prior inconsistent statements and could have been impeached with them. The record also shows that counsel had no reasonable strategy for not impeaching Lawson with them and not offering them as substantive evidence supporting Black's lack of deliberation.

Like its argument under Point II, the State suggests that the failure to call Tammy Lawson at the post-conviction hearing defeats this claim (Resp.Br.at 46). This argument was rejected in *Clay v. State*, 954 S.W.2d 344, 347-50 (Mo.App.E.D.1997) (Blackmar, S.J.) (counsel held ineffective for not investigating an eyewitness' prior inconsistent statements to police regarding his level of certainty that defendant was the murderer; failing to impeach the witness and to offer the statements as substantive evidence). The motion court in *Clay* denied the claim, because the eyewitness was not called as a witness at the evidentiary hearing. *Id*. at 347. Judge Blackmar, writing for the Court, ruled that the statements could be established by other testimony. *Id*.

Here, Lawson's prior statements were established by trial counsel's testimony (H.Tr.47-61); Officer Darren Gallup's deposition - he interviewed Lawson and took her statement, Exhibit 18 (H.Tr.10), Officer Randal J. Beebe's deposition - he took another statement from Lawson, Exhibit 17 (Beebe Depo, at 17-30, H.Tr.10), and Lawson's preliminary hearing testimony (H.Tr.2-3, 51,

Supp.L.F.247-95). The State agreed that the depositions could be used as substantive evidence at the post-conviction hearing (Gallup Depo at 4, Beebe Depo at 4-5, H.Tr.5) and did not object to the statements' admission (H.Tr.10, 51). Thus, like *Clay*, Black proved that Lawson made the prior inconsistent statements and could have been impeached with them.

The State argues, contrary to the record, that trial counsel had strategic reasons for not cross-examining Lawson with all of these statements (Resp.Br. at 43, 45). Counsel forthrightly admitted she had no reasons for failing to impeach Lawson with many of her prior inconsistent statements:

A. I have no reason.

Q. No trial strategy reason?

A. No.

(H.Tr. 49).

Q. Did you impeach Ms. Lawson with that statement?

A. I don't recall. If I didn't, I have no reason for not doing so.

(H.Tr. 50).

Q. Did you have any reason why you did not?

A. No.

Q. No trial strategy reason?

A. No.

(H.Tr. 52).

Q. And was there a reason you did not use that statement?

A. No.

Q. No trial strategy reason?

A. No.

(H.Tr. 57). Counsel said that she did not impeach with some of Lawson's inconsistent statements because it was penalty phase and she did not think the evidence was relevant (H.Tr.53, 54, 56 59). However, she admitted that, even though this was penalty phase, the statements could have been used to establish lingering or residual doubt, the very theory counsel had pursued in penalty phase (H.Tr.54-55, 59).

Thus, counsel's sole reasonable strategic reason for not cross-examining Lawson referred to her statement about whether Johnson hit Black with a beer bottle before Black stabbed him (H.Tr.60-61). As to all of the remaining statements she had no reason at all.

When this Court reviews all evidence presented in support of this claim, not just selective portions taken out of context, counsel's ineffectiveness is apparent. She had no reasonable strategic reason for not impeaching Lawson with her prior inconsistent statements that would have established that she whipped up her boyfriend's anger, by yelling and cursing Johnson and suggesting he did something perverted to her. Her prior statements showed that Johnson was not an innocent bystander, but had yelled and called Lawson names, like "bitch" and "whore," angering Black. Johnson yelled at Black too, telling him to get out of his

car. The statements would have shown that Black was upset and wanted to confront Johnson, but did not intend to kill him.

Failing to impeach Lawson created prejudice. Her prior inconsistent statements would have weakened the State's case for deliberation, and mitigated the case, likely resulting in a life sentence. A new penalty phase should result.

VI. Counsel's Failure to Challenge the DOC Records

DOC records contained hearsay upon which the state relied to obtain a death sentence. The State's argument to the contrary is unsupported by the record. Counsel's failures to object properly were unreasonable, given her strategy of attempting to exclude the records.

In penalty phase, the State introduced DOC records to prove Black was violent and dangerous, assaulting others while imprisoned. The prosecutor told the trial court his purpose in introducing the records when he offered them:

> BY MR. DANKELSON: Judge, one of the things that we have to prove is the depravity of mind and that this defendant has no regard for the sanctity of human life. I think one way to show that is that he's been assaulting people since 1976 and that's one of the reasons we are introducing State's Exhibit #24.

(T.Tr.1149). He then argued the records for their truth, to show Black had assaulted five different inmates (T.Tr.1222, 1236, 1239, App.Br.76-77).[2] The court gave each juror a copy of the records (T.Tr.1150). The prosecutor told the jurors to look at them closely (T.Tr.1222). Despite this record, the State now argues that the records were ***not*** offered for their truth, but to explain why

[2] Appellant quoted the closing argument at length in his original brief (App.Br. at 76-77).

correctional officers began their investigation (Resp.Br. at 59). This unsupported assertion must be rejected.

The State also argues that Black failed to prove that trial counsel's failure to properly object was not reasonable trial strategy (Resp.Br. at 56). Counsel testified at the post-conviction hearing that she could not recall why she did not object to the improper hearsay, to the references to post-*Miranda* silence, or to the lack of an adequate foundation under Section 490.692.2 (Shaw Depo, at 12, 13, 14). The record also shows that counsel's strategy was to try to exclude the records. She objected to them because they contained uncharged and unconvicted crimes (T.Tr.1149). Her objection was not meritorious. This Court had repeatedly held that unadjudicated bad acts could be introduced in penalty phase as long as the State provided notice. *State v. Thompson*, 985 S.W.2d 779, 792 (Mo.banc 1999); *State v. Clay*, 975 S.W.2d 121, 132 (Mo.banc 1998); *State v. Ervin*, 979 S.W.2d 149, 158 (Mo.banc 1998); *State v. Debler*, 856 S.W.2d 641, 656-57 (Mo.banc 1993). Since all of these cases were decided before this trial, counsel should have been aware of them.

Counsel objected to the DOC records based on an argument that this Court had repeatedly rejected. She failed to object based on hearsay and Confrontation, claims that this Court had ruled favorably. *State v. Kreutzer*, 928 S.W.2d 854, 867-68 (Mo.banc 1996); *State v. Nicklasson*, 967 S.W.2d 596, 616 (Mo.banc 1998) (records offered pursuant to business records exception properly excluded because they contained hearsay). These cases, too, were decided before this trial,

and counsel should have made meritorious objections to exclude the records. The State never discusses or tries to distinguish *Kreutzer* or *Nicklasson*. Rather, it ignores the record and cases, because they support Black's claim of ineffectiveness.

Kreutzer and *Nicklasson* are consistent with the recent decision in *Crawford v. Washington*, 124 S.Ct. 1354, 1369 (2004). *Crawford* held that witness's out-of-court testimonial statements are barred, under the Confrontation Clause, unless the witnesses are unavailable and the defendant had a prior opportunity for cross-examination, regardless of whether the court deems such statements reliable. *Id*. Testimonial statements include statements officers take in the course of interrogations. *Id*. at 1364.

The DOC records should have been excluded, had counsel objected on the proper legal basis. Contrary to the State's arguments (Resp.Br. at 58-59), the records are rife with hearsay. The records repeatedly set forth second or third hand allegations of violence by Black. Mr. Cook, a correctional officer, reports that Frank Lutz told him he saw Mr. Black strike inmate Hogue in the back of the head with a broom handle (Ex.4, at 2, 4, D.L.F. 476, 478). The records include handwritten statements of inmates Barnett, Williams, and Germany obtained by correctional officers in the course of their investigation (Ex.4, at 9, D.L.F.484). Barnett reports that Black did grab the broom and hit Hogue. *Id*. Williams heard the broom hit, but did not see it. *Id*.

A 1993 report said that correctional officer, Charles Pritchard "***heard from a reliable source"*** that inmate Gary Black stabbed or cut an inmate by the name of Whitman (Ex.4, at 10, D.L.F.485). Other reports discuss statements taken from witnesses and the alleged victim (Ex.4, at 11, D.L.F.486). The records included an inter-office communication that repeated the details from the "reliable source" (Ex.4, at 13, D.L.F.488).

Similarly, a 1995 investigative report tells the reader that Mr. Black was found guilty of fighting based on what John Moore, the investigator's supervisor, said he saw (Ex.4, at 16, D.L.F.491).

Another investigative report from 1986 alleges that Mr. Black walked toward inmate Higgs, doubled his fist and hit him in the face, breaking his glasses and cutting his face (Ex.4, at 20, D.L.F.495).

These investigative reports are the precise type of hearsay the Sixth Amendment requires be excluded. *Crawford, supra*. Counsel had no reason for not objecting to the hearsay. She wanted to exclude the records. Prejudice resulted since the State used them to prove Black would be dangerous in prison and should be sentenced to death. A new trial should result.

VIII. Movant's Right to Reject Appointed Counsel Under Rule 29.16

Rule 29.16(a) and this Court's decisions demonstrate that Rule 29.15 litigants are entitled to conflict-free counsel.

Striking about the State's response to this point is that it never mentions Rule 29.16 (Resp.Br. at 67-75). The Rule's plain language supports Black's right to go *pro se* in a 29.15 proceeding:

> If movant seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences.

Rule 29.16(a). Contrary to the State's argument, the Rule never requires that the request be made at a certain time (Resp.Br. at 73-74).

The State argues that 29.15 litigants can be forced to be represented by counsel with conflicts. Contrary to the State's argument, 29.15 litigants, like Black, are entitled to conflict free counsel. *Moore v. State*, 934 S.W.2d 289, 292 (Mo.banc 1996). In *Moore*, the same Public Defender office represented the movants in the motion court and on appeal. *Id.* On appeal, the movants' attorney alleged that their motion counsels had abandoned them. *Id.* The Court "[found] no indication that the public defender's office took steps to inform the movant of the ***conflict*** and seek his authority to proceed in the face of the ***conflict***, to organize itself in such a way as to ameliorate the ***conflict***, or to appoint ***conflict***

counsel to avoid the ***conflict***." *Id.* (emphasis added); *see also, State ex rel. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo.banc1986) (discussing the ability of the public defender system to ameliorate conflicts of interest in post-conviction cases by appointing contract counsel). Black is entitled to conflict-free counsel in post-conviction proceedings.

The State also argues that Black must show that post-conviction counsel's conflict adversely affected her performance. The motion court refused to consider whether a conflict even existed and heard no evidence regarding it. A remand is necessary to determine whether a conflict existed, and, if so, whether it adversely affected counsel's performance.

This Court should reverse and remand, with directions to determine whether post-conviction counsel had a conflict of interest and, if so, to appoint conflict-free counsel. If no conflict existed, Black should be allowed to proceed *pro se*, under Rule 29.16(a).

CONCLUSION

Based on the arguments in his original brief and in this reply, Mr. Black requests:

Point I, II, III, and V, a new trial;

Point IV and VI, a new penalty phase;

Point VII, vacate his conviction and sentence and remand for sentencing on second degree murder, or alternatively vacate his death sentence and impose a life sentence;

Point VIII, a remand for proceedings consistent with Rule 29.16;

Point IX, a remand with directions that Judge Dermott recuse himself and for post-conviction proceedings before a new judge.

Respectfully submitted,

Melinda K. Pendergraph, MO Bar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, MO 65201-3724
(573)882-9855
FAX (573) 875-2594

Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains 6,970 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this reply brief were postage pre-paid this 27th day of April, 2004, to Breck Burgess, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65109.

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Melinda K. Pendergraph